NO. 80-776

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

HAZIE NICHOLS SHORT,

PETITIONER

VS.

BRAXTON L. KITTRELL, JR.,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT BRAXTON L. KITTRELL, JR. IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. Whether the district court abused its discretion by dismissing plaintiff's action based on plaintiff's failure to attend her deposition and plaintiff's conduct in the proceedings below.

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OPINIONS BELOW

The United States District Court for the Southern District of Alabama granted the respondent's motion to dismiss, noting that

> Due to the nature of this case and the conduct of the plaintiff throughout this case, the Court is of the opinion that dismissal is an appropriate sanction for the failure of the plaintiff to attend the deposition.

(R. 50). The United States Court of Appeals for the Fifth Circuit affirmed the District Court's decision without opinion. (Petitioner's Appendix).

JURISDICTION

The petitioner invokes jurisdiction pursuant to 28 U.S.C. §1254(i). The decision of the United States Court of Appeals for the Fifth Circuit was issued on August 22, 1980.

STATUTORY PROVISIONS AND RULES OF COURT INVOLVED

28 U.S.C. §1254 states:

> "Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Fed. R. Civ. P. 30(b)(1)

(b) Notice of Examination: General Requirements; Special Notice; Non-Stenographic

Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

Fed. R. Civ. P. 37(b)(2) and (d)

(b) Failure to Comply with Order.

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated

under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of the subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. . .

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories, submitted under Rule 33, after proper service of the interrogatories or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending

> on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.
>
> The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

STATEMENT OF THE CASE

The petitioner, HAZIE NICHOLS SHORT, filed suit aginst THOMAS J. PURVIS, Sheriff of Mobile County, Alabama, in the United States District Court for the Southern District of Alabama seeking injunctive and declaratory relief from the Final Decree in the matter of the Administration of the Estate of Richard Paul Short,

Deceased, entered by the Respondent, BRAXTON L. KITTRELL, in his capacity as a circuit judge of Mobile County, Alabama. (R. 1-5). The Complaint alleged among other things that Hazie N. Short was not a party defendant to the administration of the estate of Richard Paul Short, deceased; that the Final Decree of the Circuit Court was on its face void and unenforceable; and that the defendant, Thomas J. Purvis, had a writ of arrest delivered to him on November 9, 1978, directing him to arrest Mrs. Short because of her failure to turn over certain items of property to the court-appointed administrator of the estate of Richard Paul Short, deceased. (R. 2-3).

The Final Decree in question, dated July 7, 1978, provided that Richard Paul Short was not mentally competent at the time he executed the document propounded by Hazie N. Short for probate as his Last Will and Testament and that the document was null and void. (R. 6-7).

Then the Court found that a second document, a purported instrument of gift in favor of Hazie N. Short and Murray E. Short and executed by Richard P. Short at or about the same time that the alleged will was signed, and a third document, an alleged power of attorney, were also executed while Richard P. Short was not mentally competent and were null and void. (R. 7). A fourth document, a savings and loan association account ownership card showing Richard P. Short and Hazie N. Short as joint tenants with the rights of survivorship, was declared to have been signed by Richard P. Short when he was mentally incompetent and that the funds contained in that account were the property of the estate of Richard Paul Short. (R. 7-8). Hazie N. Short was removed as administratrix of the estate of Richard Paul Short on the grounds that, from the evidence presented regarding her conduct,

she is not a suitable person to have further control of the subject estate, and she was ordered to file an inventory of the assets of the estate of Richard Paul Short coming into her hands and an accounting of all funds received by her as administratrix within thrity days. (R. 8, 9). The last provision of the Final Order was that the Mobile County General Administrator, Murray Hill, was appointed administrator of the estate of Richard Paul Short and that Hazie N. Short was to deliver to Murray Hill the assets of the estate of Richard Paul Short, which had come into her possession or under her control. (R. 9-10). No appeal was taken from this Final Order. (R. 15).

Hazie N. Short further asked the United States District Court for the Southern District of Alabama, for a temporary restraining order (R. 12) and in support thereof filed an affidavit (R. 14-16) stating among other items that an order for her arrest had been issued based upon

a contempt of court citation because of her refusal to transfer certain real and personal property. (R. 16). A lawyer's affidavit was also filed by the Honorable Charles S. Conley which declared among other things that Mrs. Short was not a party-defendant in the administration of the estate of Richard Paul Short, deceased. (R. 17).

On November 15, 1978, there was a hearing before the Honorable William Brevard Hand wherein Judge Hand stated that he did not believe that the Court could grant any declaratory relief since all the parties who may be affected by that relief were not before the Court. The only party present was the sheriff and he had no authority at all but to fulfill the requirement of the Circuit Court decree. (Transcript p. 4-5). Since the case was only against Sheriff Purvis, Judge Hand agreed to stay the Sheriff, although once again he pointed out that he did

not see that this Court had a great deal of jurisdiction over the issues. (Transcript p. 8). Therefore, an Order was entered restraining Defendant, THOMAS J. PURVIS, from executing upon the Appellant the writ of arrest. (R. 19-20).

On November 17, 1978, another hearing on the temporary restraining order was held before the Honorable William Brevard Hand. Judge Hand stated that at the time he granted the temporary restraining order he was not confident that the proper persons had been made parties and he only issued the order to hold the matter in status quo and that due to certain information he received since that time he was going to reconsider the question. (Transcript p. 11-12).

The first matter that was considered was a motion to join the Appellee, Judge BRAXTON KITTRELL, as a party defendant. Judge Hand

indicated that he still was not satisfied that all of the persons properly involved in this issue had been joined as parties. (Transcript p. 12).

Next Mr. Robert S. Edington, attorney for Murray Hill, administrator of the estate of Richard Paul Short, deceased, introduced docket sheets from the proceedings in the state court concerning the estate of Richard Paul Short, which showed that Hazie N. Short had indeed been a party to those proceedings, contrary to the allegations in her Complaint and the Affidavit filed with the Motion for Temporary Restraining Order. (R. 30-36). According to Mr. Edington, Mrs. Short was a petitioner in the Probate Court to have a will admitted and a respondent for confiscating assets for her own use. (Transcript p. 13). Also after a three-day jury trial, it was decided that Richard Short was non compos mentis and the will was illegal and inadmissible. (Transcript p. 13-14). Moreover, Mr. Edington stated that Hazie N. Short had originally sworn there was

no will and asked to be appointed Administratrix. Then afterwards she filed a will to be admitted to probate which named her, the wife of the brother of the decedent, as the sole heir. (Transcript p. 14). Mr. Edington went on to point out how Mrs. Short contrived to obtain the property of Richard Short, a man suffering from terminal syphilis and from a blow on the head from a car accident whom she had not seen in the thirty years prior to the accident. (Transcript p. 15-16). In spite of the court order stating that Hazie N. Short was to file an accounting of the assets coming into her hands, this has never been done. (Transcript p. 17). More importantly, she has never turned over the assets of the estate to Murray Hill, the court-appointed administrator. (Transcript p. 18). At the time the contempt order was issued the judge advised the attorney for Hazie Short that she had until two o'clock in the afternoon

to appear and that there was no wish to jail her but just to have her turn over the assets to the Administrator. Mrs. Short never appeared. (Transcript p. 19). Mrs. Short did not show up for the last two hearings before Judge Kittrell. (Transcript p. 21).

Then Mr. Hallett of Aetna Casualty Insurance Company whose company has a bond on Mrs. Short related his efforts to have Mrs. Short comply with Judge Kittrell's orders and Mrs. Short's involvement in the court proceedings in the state courts. (Transcript p. 22-23).

At the conclusion of the proceedings, Judge Hand ruled that Hazie N. Short did not come into court with clean hands when she asked the District Court to invoke its equity powers to stop the proceedings of the Circuit Court of Mobile County without joining the proper parties to that proceeding and without giving this Court an opportunity to determine

to determine the probability of success in this case since she joined as defendants only the Sheriff and now the Circuit Judge who were acting under color of state law and who have judicial immunity in most cases. (Transcript p. 30-31). Therefore, the temporary restraining order was revoked and counsel for Hazie N. Short was instructed to file a brief explaining how this action could proceed without the joinder of Murray Hill, administrator of the estate of Richard P. Short. (R. 27-28).

The motion to add Judge Braxton Kittrell as a party defendant was granted on December 6, 1978. (R. 38). At the same time, Thomas J. Purvis was dropped as a party defendant. (R. 39).

On December 11, 1978, a Notice of Deposition was sent to the counsel for Hazie N. Short stating that Hazie N. Short's deposition was to be taken on December 20, 1978, at 10:00 a.m. at the office of the attorney for Judge Braxton Kittrell before a court reporter. (R. 44).

A Motion to Dismiss for Failure to Attend Oral Deposition was filed on December 21, 1978, and as grounds therefore stated that a proper notice was issued advising Hazie N. Short to appear to be deposed on December 20, 1979, and a copy thereof was sent by registered mail, return receipt requested, to Mrs. Short's Counsel of Record; that Counsel for Judge Braxton Kittrell received the return receipt showing delivery of the notice on December 13, 1978; that neither Hazie N. Short nor her counsel contacted the counsel for Judge Kittrell to state that Mrs. Short would not appear; that there was no request for continuance or postponement of the deposition; and that at the designated time and place Hazie N. Short did not appear for her deposition. (R. 48-49).

Based on the foregoing, the District Court dismissed the case, ruling that

> "Due to the nature of this case and the conduct of the plaintiff throughout this case the Court is of the opinion that dismissal is an appropriate sanction for the failure of the plaintiff to attend the deposition."
>
> (R. 50)

REASONS FOR DENIAL OF THE WRIT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING PLAINTIFF'S CAUSE OF ACTION

The District Court dismissed the Plaintiff's action pursuant to Rule 37(d) and Rule 37(b)(2) Federal Rules of Civil Procedure. Rule 37(d), Federal Rules of Civil Procedure, provides that if a party fails to appear before an officer who is to take his deposition, after being served with a proper notice, the court may make whatever orders are just and in so doing it may use the sanctions found in Rule 37(b)(2) which include the ability to dismiss the action.

In the case under consideration, on December 11, 1978, a Notice of Deposition was sent to Plaintiff's attorney.(R. 44). The Notice provided that the deposition of the Plaintiff, Hazie N. Short was to be taken on the 20th day of December, 1978, at 10:00 a.m. at the Office of Hess, Atchison, and Stout by the Defendant, Judge Braxton Kittrell, "Pursuant to the Alabama Rules of Civil Procedure" before an officer duly authorized to take depositions and swear witnesses. (R. 44). On the appointed day the Plaintiff did not appear. Counsel for the Plaintiff made no objections to the Notice,

asked for no continuance or postponement of the deposition, and gave no indication that Hazie N. Short would not appear. (R. 48-49). Based on the foregoing, a Motion to Dismiss for Failure to Attend Oral Deposition was made. (R. 48-49). Upon consideration, and in accordance with Rule 37, Federal Rules of Civil Procedure, William B. Hand granted the Motion "due to the nature of this case and the conduct of the plaintiff throughout this case." (R. 50).

One of Petitioner's contentions is that "proper" notice was not given to Hazie N. Short; and therefore, she was not required to appear and the District Court abused its discretion in dismissing her action due to her failure to appear. This contention is based on the fact that the Notice of Deposition stated that the deposition was to be taken in accordance with the "Alabama Rules of Civil Procedure" and that the case was in federal court. The Respondent maintains that this argument is without merit.

Rule 30(b)(1), Federal Rules of Civil Procedure, states the requirements for Notices of Deposition. Its provisions require merely that "reasonable"notice be given and the only necessary items are the time and place for taking the deposition and the name and address of each person to be examined. Fed. R. Civ. P. 30(b)(1). In this case, the Notice clearly stated the person to be examined (i.e., the Plaintiff) the time and place of the examination, and it was duly addressed to the Plaintiff's counsel of record. (R. 44). Thus, reasonable notice was given and the Plaintiff, Hazie N. Short, should have attended.

Furthermore, prior to the Motion for Dismissal, counsel for Hazie N. Short made no objection to the Notice of Deposition or filed a motion for relief. According to Chagas v. United States, 369 F. 2d 643, 644 (5th Cir. 1966), "where a Notice to Take Deposition is served upon the

party's attorney of record and no motion for relief is filed on behalf of that party that it must be considered as if the Court had directed the depositions to be taken." Mrs. Short may not defend against sanctions under Rule 37(d) by contending that the notice was objectionable and improper, instead she should have applied for a protective order under Rule 26(c). 8 C. Wright and A. Miller, Federal Practice and Procedure §2291.

In summary, Appellee maintains that proper notice was given and that, if counsel for Hazie N. Short believed the notice was not proper, in accordance with the provisions of Rule 37(d), Federal Rules of Civil Procedure, he should have made a motion for a protective order on behalf of his client prior to the time of the deposition.

Another of the Petitioner's contentions is that the sanction chosen by the District Court was too severe and constituted again an abuse

of its discretion and mere punishment. However, when one examines the cases wherein the dismissal of an action was overruled, one discovers that the plaintiff's failure was due to either circumstances beyond his control or to the assertion of a constitutional right or to ignorance. For example, in Thomas v. United States, 531 F. 2d 746 (5th Cir. 1976) it was held that dismissing an action due to the plaintiff's assertion of his constitutional privilege against self-incrimination was an abuse of discretion. In Society Internationale v. Rogers, 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958), faulure was excusable when the records sought had been seized by a foreign government who refused to release all of them. And in Griffin v. Aluminum Co. of America, 564 F. 2d 1171 (5th Cir. 1977) in which the plaintiff represented himself, it was held that the plaintiff's ignorance of his obligations would prevent his action from being dismissed although his failure would not be excused and other sanctions would be available.

In the case at hand, these reasons are not present. There was no ignorance on Mrs. Short's part as to the discovery obligations placed upon her as a plaintiff since she was represented by counsel. Moreover, there was no assertion of any constitutional privilege and there were before the District Court when it ruled on January 2, 1979, no allegations of circumstances beyond Mrs. Short's control which prevented her from appearing at the deposition.

On the other hand, Respondent contends that the record shows that the District Court was well within its discretion when it dismissed Mrs. Short's action.

In Emerick v. Fenick Industries, Inc., 539 F. 2d 1379 1381 (5th Cir. 1976), it was stated that when a party demonstrates "flagrant bad faith and callous disregard of its responsibilities, the district court's choice of the extreme sanction is not an abuse of discretion."

In this case the Plaintiff began showing "bad faith" from the start of the proceedings.

The Complaint and accompanying Affidavit which was signed by Hazie N. Short stated that she had not been a party defendant to the administration of the Estate of Richard Paul Short, deceased. (R. 1-5, 14-16). However, the evidence presented and testimony given by Mr. Robert S. Edington showed that Hazie N. Short had indeed been a very involved party to those proceedings. (R. 30-36, Transcript 13-21).

The District Court indicated at the beginning and throughout these hearings that the Plaintiff had not joined the parties necessary for the granting of the declaratory and injunctive relief requested. (Transcript p. 4-5, 8, 12, and 30-31). The Plaintiff has not joined any parties to the lawsuit other than the Defendant, Judge Braxton Kittrell, or made explanation of her actions, even though the District Court

ordered Plaintiff to file a brief explaining how the action could proceed without the joinder of the Administrator of the Estate of Richard Paul Short, deceased. (R. 27-28).

At the end of a hearing on a motion for a temporary restraining order, the District Court was forced to rule that by her actions Hazie N. Short did not come into court with clean hands and the equity powers of the court would not be invoked to aid her. (Transcript p. 30-31).

Finally, in Petitioner's brief it has been alleged that the primary purpose for deposing Hazie N. Short was to bring Mrs. Short within Mobile County so that she could be arrested by the sheriff. However, a fair reading of the record will show that this entire case is nothing but an effort on the part of Hazie N. Short to avoid that arrest order after

failing to pursue her state remedy of appeal by collaterally attacking in federal court a final decree issued by the Defendant, Judge Braxton Kittrell in his capacity as a judicial officer in the Circuit Court of Mobile County.

This Court in National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 643, 96 S. Ct. 2778, 49 L. Ed. 2d 747, 751 (1976) has stressed that the sanction of dismissal "must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrant." This view was also recently repeated in the case of Roadway Express, Inc. v. Piper, _____ U.S. _____, 100 S. Ct. _____, 65 L. Ed. 2d 488 (1980).

Therefore, Respondent maintains that the District Court did not abuse its discretion in dismissing the Petitioner's action since it

justly punished her bad faith actions and the case certainly will serve as a deterrant to those plaintiffs who might be considering similar courses of action.

CONCLUSION

Based on the foregoing, the Respondent submits that the Petition for Certiorari ought not to be issued.

Respectfully submitted,

Charles A. Graddick

CHARLES A. GRADDICK
ATTORNEY GENERAL OF
ALABAMA

Elizabeth Ann Evans

ELIZABETH ANN EVANS
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

CERTIFICATE OF SERVICE

I, Elizabeth Ann Evans, an Assistant Attorney General of Alabama and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this 30th day of January, 1981, I did serve the requisite number of copies of the foregoing on the Attorney for Hazie Nichols Short, Petitioner, by mailing same to him, first class postage prepaid and addressed as follows:

Hon. Charles S. Conley,
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